

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK JAVIER OCHOA, JR.,

Defendant and Appellant.

E037937

(Super.Ct.No. SWF 006223)

OPINION

APPEAL from the Superior Court of Riverside County. Mark Ashton Cope,  
Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Gary W. Schons, Senior Assistant Attorney General, Gil Gonzalez, Supervising  
Deputy Attorney General, and Andrew Mestman, Deputy Attorney General, for Plaintiff  
and Respondent.

## 1. Introduction

A jury found Frank Javier Ochoa, Jr. guilty of the deliberate and premeditated murder of Joe Gallardo.<sup>1</sup> (Pen. Code, § 187.)<sup>2</sup> The jury found that Ochoa personally used a deadly and dangerous weapon, specifically, a wooden club. (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23).) As determined by the court, Ochoa also had two prior serious felony convictions (§ 667, subd. (a)) and two prior strike convictions (§§ 667, subds. (c) & (e)(2)(A), 1170.12, subd. (c)(2)(A)). The court sentenced Ochoa to a total of 75 years to life, plus 11 years.

On appeal, Ochoa claims the trial court erred in excluding codefendant Richard Pineda's confession to his sister that he was the one who beat Gallardo with the wooden club or stick. Ochoa challenges his conviction on the ground that he received inadequate notice that the prosecutor could use the alternative theory of murder by torture. Ochoa also challenges his conviction on the ground that insufficient evidence supported the jury's guilty verdict of first degree murder under either a theory of murder by torture or a theory of deliberate and premeditated murder.

We conclude that the court abused its discretion in excluding Pineda's confession, but the error was harmless. We also reject Ochoa's other claims and affirm his conviction.

---

<sup>1</sup> The record sometimes refers to Joe Gallardo as Joel Gallardo.

<sup>2</sup> All further statutory references will be to the Penal Code unless otherwise stated.

## 2. Factual and Procedural History

Michelle Coronado, Ochoa's fiancé, was friends with codefendant Pineda and Gallardo. Pineda lived in an apartment of a three-unit complex at 190 East 7th Street in Perris. Pineda's sister, Linda Frank, lived in another unit of the same complex. Pineda's friends visited frequently, often to party and take drugs.

In the week preceding April 26, 2003, Coronado stayed at Pineda's apartment while Ochoa resided at the Hacienda Christian Life Center. Coronado was accompanied by two others, including Gallardo. During a phone conversation between Coronado and Ochoa, Ochoa seemed upset over Coronado's living arrangements. During the week, Pineda and Gallardo had arguments over a security light and a scooter that Pineda had accused Gallardo of stealing. During one of these arguments, Gallardo punched Pineda in the stomach.

On April 25, 2003, Ochoa came to Pineda's apartment and both Ochoa and Coronado were asked to leave. As they were leaving, the couple ran into Gallardo. Gallardo told Coronado that Ochoa was "no good" and that she should not be with him. Ochoa became upset, but Coronado defused the situation by standing between the two men. About 30 minutes later, the couple returned to Pineda's apartment to retrieve Coronado's backpack.

At 8:30 in the evening on April 25, 2003, Ochoa and Coronado went to "Sal's" house, which was a couple blocks away. At Sal's house, Coronado slept and Ochoa took some drugs. When Coronado woke up in the middle of the night, she noticed that Ochoa had gone. She assumed that he was outside smoking. About dawn, when Coronado

woke up again, Ochoa still had not returned. Coronado went outside and saw Ochoa walking up to the house. Ochoa, who was sweating, said, “Hurry up. Let’s go. We got to go. We got to go.” Coronado said that Ochoa appeared to be “high.” Ochoa was wearing the same clothes that he wore when he left, except that he was wearing his white T-shirt without his orange top shirt. After Ochoa and Coronado left Sal’s house, Ochoa called his mother to wire him some money and then the two went to a motel.

At 8:30 in the morning on April 26, 2003, Pineda went to his sister’s apartment and asked her to call 911. Frank made the call and informed the operator that Pineda had told her there was a man bleeding in his bedroom and that Pineda “had to put him down.” As instructed by the operator, Frank went to Pineda’s apartment and made a second 911 call. Frank told the operator that, “[Pineda’s] got his club in his hand and he’s been pounding on [Joe’s] head. I don’t know what happened. I don’t know if they had a – Joe came in [*sic*] they had an altercation. I don’t know what happened but you’ve got to get somebody here fast. Joe is bleeding. And there’s blood everywhere and he won’t lay down. He won’t calm down.” Frank did not notice and Pineda did not mention anyone else being present during the altercation. She noticed only Pineda with a stick or branch in his hand. She had noticed the branch in Pineda’s apartment before.

Corporal Joel Morales arrived at Pineda’s apartment and found Gallardo in one of the bedrooms bleeding from his head and agonizing in pain. Morales also found a four-to five-foot stick that was bloodied at one end. The police also noted that there were pools of blood on the floor and blood splatter throughout Pineda’s bedroom and hallway. Gallardo died as a result of multiple severe blunt force impacts to his head.

Corporal Morales detained Pineda, who was cooperative, and transported him to the Perris police station. Along the way, Pineda volunteered that, “I told him to lay on the floor, and he would not listen, so I hit him with a stick. He tried to get up, and I hit him on his head. He tried again, and I hit him again. That guy would not listen to me, so I kept hitting him.”

At the police station, Senior Investigator John Cook noticed dark-colored stains on Pineda’s blue jeans. The stains appeared to be blood. Pineda had what appeared to be a recent injury to his left lower shin which was bleeding. He also had a fresh laceration on his right hand.

Meanwhile, after spending a night at the motel, Ochoa left Coronado and voluntarily admitted himself to the Riverside County Mental Health Hospital. That day, on April 27, 2003, Investigator Cook contacted Ochoa concerning the murder. Ochoa denied any involvement.

On May 12, 2003, Ochoa called 911 and confessed to killing Gallardo. During the call, Ochoa explained that he beat Gallardo over the head because he owed him money for drugs.

On the same day, during a tape-recorded police interview, Ochoa further explained that the two were arguing over money and he “snapped” and began hitting Gallardo over the head with a bat. Ochoa said that the fight began in Pineda’s bedroom but moved into the living room. Ochoa told Pineda to take the blame for the murder and threatened him and his family.

During a second police interview on May 12, 2003, Ochoa explained that he entered Pineda's house about 2:00 in the morning through the sliding glass door in Pineda's bedroom. Pineda was sitting at his computer and Gallardo was sitting on the bed. Ochoa asked to speak with Gallardo and the two men went into the living room. Ochoa asked Gallardo about the money that he owed him. Gallardo said he did not have the money and Ochoa "started flipping out." He began hitting Gallardo with a bat or stick. Ochoa initially described the bat or stick as 12-inches long, but then estimated it was about 18 inches. He said he hit Gallardo 10 to 25 times. Ochoa said the beating occurred only in the living room. After beating Gallardo, Ochoa went back to Sal's house and burned his clothes. When questioned about the inconsistencies with the physical evidence, Ochoa said that the stick could have been about 29 inches.

Later during the same interview, Ochoa provided different versions of the events. He said that Pineda also hit Gallardo. Ochoa explained that he was involved in the murder only to the extent that he sent Gallardo to Pineda's house, knowing that Pineda hated Gallardo and wanted to get rid of him. Ochoa later denied any involvement in the murder. He denied being at Pineda's house and burning his clothes. He explained his initial confession by stating that Pineda had promised to give him \$5,000.

On November 20, 2003, Randall Christianson, an investigator with the district attorney's office, interviewed Ochoa in prison. During that interview, Ochoa again denied committing the murder and said that he had lied to the police in order to get back into prison. During the trial, Ochoa also presented testimony from a psychologist who discussed Ochoa's mental problems and history of hospitalizations. The psychologist

described Ochoa as “institutionalized.” An institutionalized person is one who is dependent on institutional help for his basic needs and may prefer living in a structured environment.

About four days later, Ochoa contacted Christianson by phone and told him that he was present at Pineda’s house and witnessed the murder. He told Christianson that Pineda and Gallardo were arguing and then Pineda began hitting Gallardo.

The police conducted another interview on December 4, 2003. During that interview, Ochoa provided about three versions of the incident. He initially stated that he witnessed Pineda committing the murder. Later in the interview, Ochoa admitted that he killed Gallardo. As before, he said that the fight began over a drug debt. Toward the end of the interview, Ochoa said that both he and Pineda committed the murder.

### 3. Pineda’s Confession

Ochoa claims the trial court erred in excluding Pineda’s confession to his sister, Linda Frank. Ochoa argues that the court’s evidentiary ruling infringed upon his constitutional right to present a defense and his right to due process. Ochoa argues that the error requires reversal.

Before trial, Ochoa’s attorney sought to admit statements made by codefendant Pineda to his sister at the police station. During his police interview, Ochoa invoked his right to counsel. After the interview, the police allowed Frank to speak with Pineda and recorded their conversation. Ochoa’s attorney offered to prove that Pineda told his sister that Gallardo came to his apartment and Pineda accused him of stealing an electric razor. An argument ensued and then Gallardo came after Pineda. Pineda hit Gallardo with the

stick. When Gallardo fell, Pineda told him to stay down. Gallardo attempted to get up and Pineda struck him again.

Pineda's attorney objected to this evidence in part because it was inadmissible hearsay. Pineda's attorney stated that, if the court found that the evidence was admissible under a hearsay exception, she would reassert her motion for a separate jury. The prosecutor also objected to the evidence. He argued that the evidence did not fall under the declaration against penal interest exception because Pineda's statement suggested that he struck Gallardo to defend himself.

The court agreed that Pineda's statement was exculpatory because it suggested that he was seeking to establish that he killed Gallardo in self-defense. The court also found that Pineda's statements were cumulative to his statements on another occasion.

As a preliminary matter, the People argue that Ochoa waived this claim by failing to raise an objection below. On the contrary, Ochoa's request to use Pineda's statements, which afforded the trial court an opportunity to determine the admissibility of the evidence under Evidence Code section 1230, was sufficient to preserve the issue for appeal. (See *People v. Lucas* (1995) 12 Cal.4th 415, 462.)

Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social



disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.” “The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant’s penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.” (*People v. Duarte* (2000) 24 Cal.4th 603, 610.) We review a trial court’s determination under section 1230 for an abuse of discretion. (*People v. Lawley* (2002) 27 Cal.4th 102, 153-154.)

In this case, there was no question as to Pineda’s unavailability. Pineda was being prosecuted for the same crime before the same jury and had expressed no intention to testify during the trial.

The contention among the parties concerned whether the declaration was “specifically dis-serving” of Pineda’s penal interests. (See *Duarte, supra*, 24 Cal.4th at p. 612.) The trial court excluded the evidence because part of Pineda’s statement was exculpatory. As stated, the court found that Pineda was attempting to establish that he beat Gallardo in self-defense.

In citing the *Duarte* case, the court stated that a statement that is in part inculpatory and in part exculpatory fails to satisfy the requirement of reliability under Evidence Code section 1230. In *Duarte*, the California Supreme Court determined whether the trial court erred in admitting an accomplice’s police statement. The accomplice stated that he committed the drive-by shooting in retaliation for a prior shooting. He also stated that they had shot at the wrong house. The court found error

because the accomplice's statements were not specifically disserving of his penal interest. (*Duarte, supra*, 24 Cal.4th at p. 613.)

The court in *Duarte* held that an otherwise self-serving statement cannot be admitted under the hearsay exception simply because it contains an admission. The court explained, “. . . ‘the precedents in the hearsay area provide a persuasive reminder that declarations against penal interest may contain self-serving and unreliable information’ and, consequently, ‘an approach which would find a declarant’s statement wholly credible *solely because* it incorporates an admission of criminal culpability is inadequate.’ [Citation.] As scholars have observed, “‘a self-serving statement lacks trustworthiness whether it accompanies a disserving statement or not.’” [Citation.] Moreover, that a hearsay statement may be facially inculpatory or neutral cannot always be relied upon to indicate whether it is ‘truly self-inculpatory, rather than merely [an] attempt[] to shift blame or curry favor.’ [Citation.] Even a hearsay statement that is facially inculpatory of the declarant may, when considered in context, *also* be exculpatory or have a net exculpatory effect. [Citation.] Ultimately, as the high court has noted, ‘whether a statement is self-inculpatory or not can only be determined by viewing it in context.’ [Citation.]” (*Duarte, supra*, 24 Cal.4th at pp. 611-612.)

The court in *Duarte* also explained, “. . . a hearsay statement ‘which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible.’ [Citations.]” (*Duarte, supra*, 24 Cal.4th at p. 612.)

Based on these rules, the court in *Duarte* concluded that only the incriminating part of the accomplice's statement should have been admitted under Evidence Code section 1230. The court concluded that most of the accomplice's statement was not specifically dis-serving and, therefore, should have been excluded. (*Duarte, supra*, 24 Cal.4th at pp. 613-614.)

Pineda's statement in this case is distinguishable from the statement in *Duarte*. In *Duarte*, the accomplice made the statement largely to justify his actions to the police. In this case, Pineda's statement was a description of the crime to his sister. According to Pineda, while he and Gallardo were arguing over a razor, Gallardo came after him. Pineda picked up the stick and hit Gallardo, causing him to fall to the ground. He told Gallardo to stay down. Gallardo refused and Pineda hit him again. The net effect of Pineda's statement was inculpatory.

The context of the statements also indicates that Pineda's statement was not self-serving. Pineda had not yet been placed under arrest for Gallardo's murder. The officers attempted to question him concerning the crime. Pineda invoked his right to counsel. Afterwards, the police allowed Pineda to speak with his sister. It is within this context that Pineda admitted that he was the one who killed Gallardo. Unlike the accomplice in *Duarte*, Pineda had little motivation to come forward with an admission to justify his actions.

Also, in his statement, Pineda only points to himself and not Ochoa or anyone else. He makes no effort to shift blame. Even in asserting a claim of self-defense, he is

admitting that he indeed was the one who hit Gallardo. Because at this point no arrests had been made and no charges had been filed, Pineda's statement is clearly inculpatory.

Moreover, instead of making a statement to the police, Pineda recounted the incident during what was presumably a private conversation with his sister. There is nothing in the record to suggest that Pineda was aware that the conversation was being taped recorded. His invocation of his right to counsel indicated that he was unwilling to speak with the police. While he may have had reasons for giving incriminating information to his sister and the police at the scene of the crime (i.e., Ochoa's threats), there was no apparent reason for him to insist upon his guilt during this private conversation. The fact that the statement was made privately to his sister weighs in favor of its reliability.

It appears that the court inappropriately focused on Pineda's assertion that Gallardo came after him. The court indicated that because Pineda's statement was in part exculpatory, it did not constitute a statement against penal interest. There is, however, no litmus test to determining whether a statement is sufficiently reliable under Evidence Code section 1230. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.) The court, instead, must consider the totality of the circumstances. (*Ibid.*) The circumstances, as discussed above, clearly show that the statement was inculpatory. Before being arrested and charged with the crime, Pineda admitted to his sister during a private conversation that he was the one who was responsible for Gallardo's injuries. Pineda's statement should have been admitted as a statement against penal interest under Evidence Code section 1230.

We turn to the question of whether the trial court's error was prejudicial. Ochoa argues that the court's ruling to exclude Pineda's statement prevented him from presenting a complete defense in violation of his constitutional rights under the Sixth and Fourteenth Amendments. Ochoa, therefore, contends that the proper standard is whether the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 23. Although Ochoa acknowledges that courts have applied the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836-837, where the case involved an erroneous admission of hearsay evidence, he argues that the *Chapman* standard applies in cases involving an erroneous exclusion of critical defense evidence under the hearsay rule.

We find no reason to draw the distinction that Ochoa suggests. Under certain circumstances, the erroneous admission of evidence can be equally or more damaging to the defense than any exclusion of evidence. For example, the court may admit a statement from a reliable source directly implicating the defendant in the crime. (See, e.g., *Duarte, supra*, 24 Cal.4th at p. 619.) The exclusion of the evidence alone does not compel the use of the higher standard. In fact, courts have indicated that the *Watson* standard also applies to the erroneous exclusion of evidence. (See, e.g., *People v. Koontz* (2002) 27 Cal.4th 1041, 1077-1078; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103; *People v. Frye* (1985) 166 Cal.App.3d 941, 951.)

Rather, the relevant distinction is whether the error rose to the level of a constitutional violation. "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense

theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24)." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

The same analysis applies here. In excluding the evidence, the court did not prevent Ochoa from arguing that Pineda was responsible for the murder and that Pineda had confessed to the crime. The court's ruling only deprived Ochoa of certain evidence that would have supported this defense.

There was ample evidence in the record from which Ochoa could have argued that Pineda was the one who was responsible for Gallardo's murder. Most of the physical evidence pointed to Pineda. Pineda was at the scene of the crime. Pineda had the bloody stick in his hand. The officers saw blood stains on Pineda's clothes. Pineda also had a couple of injuries, including a laceration to his right hand. Pineda also admitted his involvement. Pineda told Frank that he "had to put [Gallardo] down." Even without being prompted, Pineda voluntarily confessed to the police that he repeatedly hit Gallardo with the stick. The record shows that Ochoa was not deprived of his right to present a defense, but was precluded from using certain evidence.

Granted, the evidence was not cumulative to the other evidence presented at trial, contrary to the court's finding. Based on the timing and circumstances of Pineda's statement, it could have bolstered Ochoa's defense. The jury's not guilty verdict indicated that it likely rejected Pineda's initial confessions because of Ochoa's threats. During his confessions, Ochoa repeatedly stated that he had threatened Pineda to take responsibility for the crime or else Ochoa would harm him and his family. Ochoa's threats provided an explanation for Pineda's initial confession to his sister and the police. Pineda's subsequent statement to his sister, however, might have suggested that Pineda confessed not because of Ochoa's threat, but because he in fact participated in the crime.

Nevertheless, while Pineda's statement may have affected the jury's determination as to his involvement in the crime, we cannot conclude that there was a reasonable probability that it affected the jury's determination of Ochoa's guilt. In order to find Ochoa guilty, the jury must have relied heavily on Ochoa's own confessions. Starting with the 911 call on May 12, 2003, Ochoa repeatedly admitted that he beat Gallardo over the head with a stick because of a drug debt. He provided specific details concerning the crime, including how he entered the house and where he found the victim. Although Ochoa denied responsibility on a couple of occasions, he later returned to his original story. On December 4, 2003, he again admitted that he killed Gallardo over a drug debt. Based on these confessions, the jury likely found that Ochoa committed the crime and left Pineda holding the stick.

Although Ochoa provided inconsistent versions of the killing and statements that at times were incompatible with the physical evidence (i.e., the length of the stick and the

location of the attack), his confessions along with the other evidence presented at trial provided ample evidence of his guilt. The evidence indicated that, hours before the murder, Ochoa was visibly upset with Gallardo over his comments concerning his girlfriend, Coronado. Referring to Gallardo, Ochoa said, “that fool disrespected me.” According to Coronado, Ochoa was missing during the hours when the murder took place. When Ochoa returned, he was sweating and appeared disheveled. He was not wearing his top shirt. He was walking from the direction of Pineda’s house. In a hurry, Ochoa and Coronado left Sal’s house, had some money wired to them, and then spent the evening at a motel. The next day, Ochoa admitted himself into the county mental hospital. Based on this circumstantial evidence and Ochoa’s confessions, we conclude that, even had the evidence been admitted, it was not reasonably likely that the jury would have reached a different verdict.

#### 4. Murder by Torture Theory

Ochoa claims he received inadequate notice that he may be convicted under a murder by torture theory. Over Ochoa’s objection, the court instructed the jury on the murder by torture theory. Although the prosecutor did not request the instruction, he presented argument to the jury that it could find the defendants guilty based on their intent to inflict extreme and prolonged pain. Ochoa argues that, because he was not charged with murder by torture, the court’s instruction and the prosecutor’s argument violated his due process right to notice of the charges against him.

On the contrary, as argued by the People, the prosecutor is not required to identify the specific theory of murder. “Both the Sixth Amendment of the federal Constitution



and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them.’ [Citation.] But ‘[w]e have long held that under this state’s statutory scheme, an accusatory pleading charging a defendant with murder need not specify the theory of murder on which the prosecution intends to rely.’ [Citation.] Although there may be some situations in which the United States Constitution may require greater specificity, generally an accused will receive adequate notice of the prosecution’s theory of the case from the evidence adduced at the preliminary examination or the indictment proceedings. [Citation.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1205; see also *People v. Thomas* (1987) 43 Cal.3d 818, 829, fn. 5 [discussing both torture-murder and felony-murder].)

Not only is the prosecutor not required to specify the theory on which it intends to rely, but also, the jury is not required to agree unanimously on a particular theory of first degree murder. (*People v. Hughes* (2002) 27 Cal.4th 287, 369 [felony-murder], citing *People v. Guerra* (1985) 40 Cal.3d 377, 386.) It matters little, therefore, whether the prosecutor specified a particular theory so long as the jury was convinced beyond a reasonable doubt that the defendant was guilty of first degree murder as defined by statute. (*Guerra, supra*, at p. 386 [felony-murder].) “Murder is of the first degree, pursuant to statute, when it consists of a murder, i.e., an unlawful killing with malice aforethought, that ‘is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait,

torture, or by any other kind of willful, deliberate, and premeditated killing . . . .’ ([§ 189.])” (*People v. Hansen* (1994) 9 Cal.4th 300, 319.)

Furthermore, if Ochoa failed to anticipate the prosecution’s theory, he also had the option of moving to reopen the proceedings to present evidence to address the theory. (*People v. Gurule* (2002) 28 Cal.4th 557, 630 [lying-in-wait].) In exercising this option, Ochoa would have had sufficient time to confront the facts, thereby mitigating any prejudice resulting from a lack of notice. (*Ibid.*) This is particularly true when the unanticipated theory is based on facts that are no different from the facts presented during the preliminary hearing.

In this case, the evidence adduced at the preliminary hearing provided adequate notice of the alternative theory of murder by torture. (See *People v. Diaz* (1992) 3 Cal.4th 495, 557 [murder by use of poison].) As discussed below, murder by torture requires a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain. (§ 189; *People v. Elliot* (2005) 37 Cal.4th 453, 466.) Such intent may be inferred from the circumstances, including the manner of the killing and the condition of the victim’s body. (*Id.* at p. 467.)

During the preliminary hearing, the police investigators testified concerning the crime scene, the victim’s body, and Ochoa’s confession. One of the investigators noted that there were large amounts of blood splattered and pooled at various locations throughout the bedroom and the hallway of Pineda’s apartment. There also was blood on the walls and on the ceiling of the bedroom. The victim was bleeding profusely from the head. He had multiple blunt force injuries to the back of his head and shoulders. Both of

his shoulders were dislocated. This evidence indicated that the victim attempted to escape, but Ochoa continued his brutal attack.

Another investigator testified concerning Ochoa's confession. Ochoa had explained that, when he confronted Gallardo about the drug debt, Gallardo refused to pay him and turned his back on him. This reaction caused Ochoa to want to "immediately retaliate." Using all his might, Ochoa hit Gallardo 10 to 20 times. The transcripts of Ochoa's confession also showed that the blows continued even after Gallardo fell to the ground and was screaming for help.

Based on defendant's statements and the evidence provided at the preliminary hearing, including the testimony concerning the blood splatter and the condition of the victim's body, we conclude that the evidence was adequate to apprise defendant that murder by torture was a potential theory for first degree murder. Therefore, Ochoa was not denied his constitutional right to notice of the charges against him.

#### 5. Sufficiency of the Evidence

Ochoa also claims that there was insufficient evidence to support the jury's verdict of first degree murder under either the theory of murder by torture or deliberate and premeditated murder.

In evaluating a claim of insufficiency of the evidence, the appellate court must review the whole record in the light most favorable to the judgment and determine whether it discloses substantial evidence—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Combs* (2004) 34 Cal.4th 821, 849; *People v. Johnson*

(1980) 26 Cal.3d 557, 576-578.) Because it is the exclusive province of the trier of fact to determine the witnesses' credibility and resolve factual conflicts, the appellate court must not reweigh the evidence and substitute its own factual determinations. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) Moreover, even if there is evidence in the record that reasonably supports a contrary finding, we must affirm the conviction if substantial evidence supports the trier of fact's finding and verdict. (*People v. Little* (2004) 115 Cal.App.4th 766, 771; *People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

The jury found Ochoa guilty of first degree murder. Murder is an unlawful killing committed with malice aforethought. (§ 187, subd. (a).) As stated above, murder with malice aforethought may be established if the killing was committed by means of torture as well as if the killing was committed with deliberation and premeditation. (*People v. Hansen, supra*, 9 Cal.4th at p. 319.)

#### A. Murder by Torture

Ochoa argues that there was no evidence that he intended to inflict extreme and prolonged pain upon Gallardo. He contends that the attack was an explosion of violence committed under the influence of methamphetamine.

Based on the court's instruction and the prosecutor's argument, the jury could have found Ochoa guilty under a theory of murder by torture. "The essential elements of first degree torture murder are: (1) the acts causing the death must involve a high degree of probability of death, and (2) the defendant must commit the acts with the intent to cause cruel pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

Intent to cause cruel pain and suffering may be established by the circumstances, including the manner of the killing and the condition of the victim's body. (*People v. Elliot, supra*, 37 Cal.4th at p. 467.) "[T]he severity of a victim's wounds is not necessarily determinative of intent to torture. Severe wounds may be inflicted as a result of an explosion of violence [citation] or an 'act of animal fury' [citation]." (*People v. Mincey, supra*, 2 Cal.4th at p. 432, citing *People v. Steger* (1976) 16 Cal.3d 539, 547, fn. 3 & *People v. Tubby* (1949) 34 Cal.2d 72, 78.) The nature of the victim's wounds is, nevertheless, relevant to the analysis. (*Mincey, supra*, at p. 433.)

This case is distinguishable from the cases cited by Ochoa. In those cases, the killing occurred for no apparent purpose or for reasons other than to inflict extreme and prolonged pain. (See *People v. Steger, supra*, 16 Cal.3d at p. 548; *People v. Tubby, supra*, 34 Cal.2d at p. 78; *People v. Anderson* (1965) 63 Cal.2d 351, 360.) In this case, when viewed in a light most favorable to the verdict, the evidence showed that Ochoa intended to cause Gallardo to suffer extreme pain for revenge or some other sadistic purpose.

There was substantial evidence that Ochoa acted with the requisite intent. The evidence indicated that Ochoa returned to Pineda's apartment to exact revenge for Gallardo's earlier show of disrespect. Jealousy also could have been a motivating factor. Instead of or in addition to these reasons, Ochoa also may have sought to cause Gallardo to suffer because he failed to pay him for the drugs that he had advanced, as Ochoa himself repeatedly admitted.

As discussed earlier, the circumstances, including the manner of the killing and the condition of the victim's body, supported a finding of an intent to inflict extreme and prolonged pain. There were pools of blood and blood splatter on the floor and walls of the hallway and bedroom. There also was blood splatter on the bedroom ceiling. The blood splatter evidence, along with the wood splinters, indicated that the victim was at about five different locations in the hallway and bedroom during the course of the attack. The height of the blood splatter on the walls indicated that the victim was at times standing, sitting, and on the ground. Based on the evidence, the jury reasonably could have found that Ochoa pursued Gallardo as he attempted to avoid his attacker.

Ochoa admitted that, when Gallardo attempted to run away from him, "[t]hat's when I started fucking him up more." Ochoa continued his attack and struck Gallardo 10 to 25 times, although Gallardo was bleeding profusely and screaming for help. When the police arrived, the officers saw Gallardo looking out of the sliding glass door, indicating that he was conscious and experiencing great pain throughout the attack. When the officers entered the apartment, Gallardo was unresponsive, but visibly agonizing in pain. Gallardo died as a result of the multiple blows to his head.

From this evidence, the jury reasonably could have inferred that the attack was not simply an explosion of violence, but was intended to inflict extreme and prolonged pain. We conclude that substantial evidence supported the jury's verdict based on a theory of murder by torture.

## B. Deliberate and Premeditated Murder

The jury also could have found Ochoa guilty of first degree murder because he killed Gallardo with deliberation and premeditation.

Deliberate and premeditated murder requires more than an intent to kill. (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.) The People also must show that the killing was deliberate (i.e., the result of a careful weighing of considerations) and premeditated (i.e., thought of in advance). Deliberate and premeditated murder arises out of a cold, calculated judgment, rather than a rash impulse. (*Ibid.*) “Generally, there are three categories of evidence sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citation.] When evidence of all three categories is not present, ‘we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.’ [Citation.] But these categories of evidence, borrowed from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, ‘are descriptive, not normative.’ [Citation.] They are simply an ‘aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.’ [Citation.]” (*Cole, supra*, 33 Cal.4th at p. 1224.)

In viewing the evidence in the light most favorable to the verdict, we conclude that there was substantial evidence of motive, method, and planning. As discussed above, Ochoa’s earlier hostile encounter with Gallardo provided the impetus for the subsequent

attack. It is apparent from Ochoa's confession that jealousy or revenge, or a combination of the two, caused him to return to Pineda's house to confront Gallardo.

There also was evidence of planning. In reflecting on the earlier encounter, Ochoa remarked that Gallardo had "disrespected" him. At some point in the middle of the night, Ochoa went back to Pineda's apartment. He was wearing a pair of gloves. Although possibly for unrelated reasons, Ochoa also had some clothes stashed away. After leaving Pineda's apartment, Ochoa burned his clothes and put on the fresh set of clothes.

While the evidence of the manner of killing was more equivocal, the jury reasonably could have found the evidence showed that Ochoa was acting on a predetermined plan to kill Gallardo. The process of premeditation and deliberation refers to the extent of reflection, rather than any duration of time. The defendant may have considered his options quickly and arrived at his plan to kill within a very short period of time. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) Even if Ochoa intended only to confront Gallardo about the drug debt, Gallardo's ambivalence to him may have triggered this process of premeditation and deliberation. Ochoa described his thoughts as follows: ". . . then he said he didn't have it. So I started flipping out, you know what I mean? I started plotting what am I going to do, you know what I mean? So I check him or should I just walk away. So I just and then I hit him over the head." Although "flipping out" suggests a rash impulse, the jury reasonably could have considered this evidence to indicate that Ochoa deliberately chose to respond in violence. As discussed above, the evidence also indicated that, during the attack, Ochoa relentlessly beat Gallardo despite the fact that Gallardo was unarmed, had fallen to the ground, and was



screaming for help. The manner of killing, therefore, suggested that Ochoa quickly decided on a course of action and then followed through with his plan.

We conclude that, based on the strong evidence of motive with the additional evidence of planning and the manner of killing, the jury reasonably found that Ochoa committed the murder with deliberation and premeditation. (See *People v. Young* (2005) 34 Cal.4th 1149, 1183.) The evidence in the record, therefore, supported the jury's verdict of first degree murder under both theories of premeditated murder and murder by torture.

#### 6. Disposition

We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut  
J.

We concur:

s/Ramirez  
P. J.

s/Hollenhorst  
J.